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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 528

WILLIAM HEIKKILA, PETITIONER

v.

BRUCE G. BARBER, INDIVIDUALLY AND AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. I-V, R. 32-35) is reported at 216 F. 2d 407.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1954 (Pet. App. V, R. 36). The petition for a writ of certiorari was filed January 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

In *Heikkila* v. *Barber*, 345 U. S. 229, this Court held that this petitioner could obtain judicial review of the order of deportation issued against him in January 1952 only in habeas corpus proceedings. The question presented is whether, nevertheless, the order of deportation may now be reviewed by a declaratory judgment action instituted after the effective date of the Immigration and Nationality Act of 1952.

STATUTE INVOLVED

Section 405(a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 280, provides in pertinent part:

> Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * warrant of arrest, order or warrant of deportation * * * or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes, conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided

therein, hereby continued in force and effect. * * *

STATEMENT

On January 11, 1952, petitioner was ordered deported under Section 22 of the Internal Security Act of 1950, 64 Stat. 1006, on the ground that from 1929 to 1939 he had been a member of the Workers Party, and its successor, the Communist Party of the United States (R. 11). In July 1952, he brought an action in the United States District Court for the Northern District of California for a declaratory judgment and injunctive relief in which he attacked the constitutionality of the statute on which the deportation order was based, and the validity of the administrative proceedings. A three-judge court, which had been convened pursuant to 28 U. S. C. 2284, dismissed the complaint. This Court affirmed the order of dismissal, holding that the order of deportation was reviewable only in habeas corpus proceedings. *Heikkila* v. *Barber,* 345 U. S. 229.

Thereafter, petitioner again sought review of the deportation order by an action in the United States District Court for the Northern District of California for a declaratory judgment and injunctive relief (R. 3-16), asserting that such remedy was then available under the Immigration and Nationality Act of 1952 (R. 13). The District Court dismissed the complaint (R. 21), and the Court of Appeals affirmed the order of the District Court (R. 36). Two judges were of the view that the prior decision of this Court was *res judicata* on the issue

of whether the present action would lie (R. 32-34). Judge Pope, who was of the view that the prior decision was not *res judicata,* thought that the Immigration and Nationality Act of 1952 had no application to review of deportation orders which had been issued prior to the effective date of that Act (R. 34-35).

ARGUMENT

The issue of whether deportation orders issued *after* the effective date of the 1952 Act are made reviewable by that Act in proceedings other than habeas corpus is now before this Court in *Shaughnessy* v. *Pedreiro,* No. 374, this Term. Nevertheless, we believe that there is no occasion to defer consideration of the instant petition, for the court below was correct in holding that any additional right of review under the 1952 Act would not apply to the present case in which the order of deportation was issued *prior* to the effective date of the 1952 Act.

As the court below noted, the 1952 Act had become effective before the argument on petitioner's prior appeal on February 4, 1953. This Court's statement in its opinion (345 U. S. at p. 232, fn. 4)—"We do not consider the 1952 Act * * * which took effect after Heikkila's complaint was filed"—implies that the Court did not consider the 1952 Act as applicable to his case. The petition for rehearing in that case (No. 426, O. T. 1952) expressly requested the Court to consider the effect of the 1952 Act.

It is unnecessary to consider whether the prior decision is technically *res judicata,* since the 1952

Act would, in any event, have no application to this case. This Court's prior decision turned on the fact that, prior to the 1952 Act, deportation orders had by statute been declared to be "final," thereby precluding judicial review in the usual sense. The finality thus accorded to prior deportation orders is clearly saved by the savings clause, Section 405(a), of the 1952 Act, whether or not later orders issued under the 1952 Act are treated as "final" otherwise than in the habeas corpus proceedings made available by the Constitution. Thus, the 1952 Act did not establish retroactively a new procedure for judicial review of deportation orders. If orders issued under the new Act should be held reviewable in proceedings other than habeas corpus, it would be because this Court would find that Congress did not intend such orders to be as final as were orders issued under the old Act. Any such ruling would not effect the restricted reviewability of orders issued before the effective date of the 1952 Act.

By the present action, petitioner has for two years delayed efforts by the government to effectuate the order of deportation.[1] He is raising issues which have, for the most part, already been decided against him. This Court's decision in *Galvan* v. *Press,* 347 U. S. 522, disposes of his attack on the constitutionality of the statute, including his allegedly new contention (see Pet. 9, 19-20)

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[1] Action by the District Director under the deportation order was stayed pending appeal in this case (R. 22, 26-27).

that if the Communist Party did advocate the overthrow of the government, he did not know it. See 347 U. S. at p. 530. Petitioner, who belonged to the Party from 1929 to 1939 (the year aliens were expelled) [2] can hardly claim that his membership was so nominal that he was not in the deportable class. And his contention that his voluntary admission of membership in the Party, made in proceedings which had been discontinued because of the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, was thereafter inadmissible in evidence, is frivolous.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
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WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

JANUARY, 1955.

[2] See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 593.

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